

The ESTATE PLANNER

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ESTATE PLANNING RED FLAG

You haven't discussed planned gifts
with the charities that will receive them

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ESTATE PLANNING IN DIVORCE: DON'T PUT IT OFF

Going through a divorce can be a traumatic experience — not to mention a time-consuming and expensive one. So it's no surprise that separating couples often overlook the impact of divorce on their estate plans. But neglecting to update your plan can lead to unintended consequences.

UPDATE YOUR WILL AND TRUSTS

Unless you wish to provide your former spouse with an inheritance, you should — as soon as possible after you decide to divorce — amend your will and any trusts to eliminate him or her as a beneficiary. In addition, unless you're comfortable with your former spouse administering your estate or controlling your wealth, you should designate someone else as executor or trustee.

This is true even if you live in one of the many states where divorce automatically nullifies any gifts or bequests to an ex-spouse and automatically revokes an appointment of a former spouse as executor or trustee. First, if you die before the divorce is final — even if you're legally separated — your spouse will still inherit in accordance with your will or revocable trust and his or her appointment as executor or trustee likely will stand.

Second, typically, the laws in these states treat your estate plan as if your former spouse had predeceased you. If you've named contingent or residual beneficiaries, any property your spouse would have received will go to them. If not, the property will pass according to the laws of intestate succession. But relying on these laws can be dangerous.

Suppose, for example, that your will leaves all of your assets to your spouse or, if your spouse predeceases you, to your children. If you and your spouse divorce, your children stand to inherit your estate. But what if your children are minors? In that case,

the court would appoint a guardian to manage their inheritance and that guardian would most likely be your former spouse.

To avoid this result, it's best to update your estate plan. In this case, for example, you might want to leave your assets in a trust for the benefit of your children, managed by a trustee of your choosing.

Finally, keep in mind that, in many states, as long as you're legally married, your spouse will retain elective share or community property rights to a portion of your estate. So while updating your plan soon after you decide to divorce can reduce the amount your spouse will receive if you die while you're still married, it's difficult to disinherit him or her completely before the divorce is final.

CHANGE YOUR BENEFICIARY DESIGNATIONS

Amending your will or trust isn't enough if, like most people, you own assets that are distributed on death via a written beneficiary designation. These assets include life insurance policies, IRAs, other retirement plans, payable-on-death (POD) bank accounts and transfer-on-death (TOD) brokerage accounts.



In some states, a divorce automatically revokes spousal beneficiary designations under certain circumstances. But, again, relying on state law is risky. Third parties, which may not be aware of your divorce, aren't liable for distributing assets to the person named on a valid beneficiary designation form. So, to ensure that your wishes are carried out, it's best to contact your employers, financial institutions, insurance providers and brokerage firms and submit change of beneficiary forms.

If you own assets that are distributed on death via a written beneficiary designation, amending your will or trust isn't enough.

Be aware that, if you'd like to change the beneficiary of a qualified retirement plan to someone other than your spouse, you'll need to obtain your spouse's consent. This requirement no longer applies once your divorce is final.

REVOKE YOUR POWERS OF ATTORNEY

Most married people execute powers of attorney or directives that authorize their spouses to make financial or health care decisions on their behalf should they become incapacitated.

If you've signed such documents, and you don't want your former spouse to exercise such authority, be sure to revoke them.

And if you've provided copies to third parties, such as financial institutions or health care providers, notify them in writing of the revocation to ensure that they don't rely on them.

REVIEW YOUR PLAN

If you recently divorced, or if you're contemplating a divorce, consult your advisor as soon as possible to review your estate plan.

In addition to eliminating your former spouse's access to, or control over, your wealth, as a newly single person you may need to rethink your estate planning strategies. (See "Estate planning for singles" below.) ♣

Estate planning for singles

If you get divorced, it's critical to review your estate plan. As a single person, the estate planning strategies you designed with your spouse may no longer be effective. Many of the strategies employed by married couples focus on leveraging their combined gift and estate tax exemptions and making the most of the unlimited marital deduction. But after you and your spouse split up, you're left with one exemption and no marital deduction.

Consider this example. Jerry and Elaine are married, with two children, and have a total of \$10 million in assets — \$7 million in Jerry's name and \$3 million in Elaine's name. They divorce and agree that each spouse will keep the property titled in his or her name.

When Jerry and Elaine were married, the use of the marital deduction, estate tax exemption, and/or portability allowed them to combine their estate tax exemptions (currently \$5.25 million each, or \$10.5 million together) to shield all of their wealth from federal gift and estate taxes. After the divorce, if Jerry dies and leaves his property to his kids, his estate will be subject to a \$700,000 tax (at the current rate of 40%).

Jerry would be well advised to consider strategies that allow him to transfer his wealth at a lower estate tax cost — such as a family limited partnership or grantor retained annuity trust.

PREPARE YOUR ESTATE PLAN FOR POSTMORTEM FLEXIBILITY

The more flexibility your estate plan has, the greater the chance your wishes will be carried out as you planned after your death. Even though federal gift and estate tax laws now have some certainty — after years of uncertainty — Congress can still change tax laws in the future. And your family circumstances almost certainly will change over time.

The good news is that there are postmortem estate planning strategies your family can put to use in case of changing situations. But you must prepare for them now.

PLAN FOR DISCLAIMERS

A disclaimer is an irrevocable, unqualified refusal by a beneficiary to accept a bequest, allowing the property to pass to another beneficiary.

Normally, using a disclaimer to direct property to someone else would be considered a taxable gift. But there's an exception for "qualified" disclaimers.

To qualify, a disclaimer must:

- ◆ Be in writing,
- ◆ Be delivered to the estate's representative within nine months after the transfer is made (or, if the disclaimant is a minor, within nine months after the disclaimant turns 21),
- ◆ Be delivered before the disclaimant accepts the property or any of its benefits, and
- ◆ Cause the property to pass to the deceased's surviving spouse or to someone other than the disclaimant, without any direction from the disclaimant.

This last point is critical and requires some planning on your part. To ensure that the disclaimant doesn't direct the property's disposition, the property must pass automatically to a contingent beneficiary according to the terms of your will or trust.



DISINHERIT YOUR SPOUSE

Another strategy for redistributing your wealth after you're gone is the spousal right of election. In most states, a surviving spouse has the right to circumvent your will and take an elective share (one-half or one-third, for instance) of certain property. So, for example, if you leave all of your assets to your children or other beneficiaries, your spouse might

exercise his or her right of election if it would produce a more favorable tax outcome. Check with your estate planning advisor to see if this strategy is applicable in your state.

Keep in mind, however, that exercise of the election with respect to property held in charitable remainder trusts may disqualify those trusts.

SET UP A QTIP TRUST

Qualified terminable interest property (QTIP) trusts are often used to take advantage of the marital deduction while ensuring that assets are preserved for the children (particularly children from a previous marriage) and receive some creditor protection.

Ordinarily, to qualify for the marital deduction, you must transfer assets to your spouse with no strings attached. The QTIP trust is an exception to this rule. So long as your spouse receives all of the trust income for life and certain other requirements are met, your estate can enjoy the benefits of the marital deduction while still preserving assets for your children or other beneficiaries. When your spouse dies, any remaining trust assets pass to your beneficiaries but are taxed as part of your spouse's estate.

A strategy for redistributing your wealth after you're gone is the spousal right of election.

Even if you don't need a QTIP trust to protect your children or preserve your assets, it may still be a good strategy. Why? Because it creates opportunities for postmortem estate planning.

To claim the marital deduction for amounts transferred to a QTIP trust, your executor or personal representative must make an election on your



estate tax return. A properly designed QTIP trust gives your representative the flexibility to make the election, not make the election, or even make a partial election, depending on which strategy would produce the optimal results.

Suppose, for example, that when you die Congress has substantially increased the federal estate tax exemption.

If the marital deduction isn't necessary to avoid estate taxes, your representative might decline to file a QTIP election and instead apply your estate tax exemption to the transfer. That way, when your spouse dies, the trust assets will pass to your children tax-free, regardless of any future changes in estate tax rates or exemption amounts.

MAXIMIZE FUTURE OPPORTUNITIES

An estate plan is *not* a static document. As major changes occur during your lifetime, such as marriage, children or divorce, you revise your plan accordingly.

You can take steps now to maximize opportunities for postmortem planning strategies for your family to implement after your death. Discuss your options with your advisor. ♣

THE U.S. SUPREME COURT DOMA RULING

HOW IT AFFECTS ESTATE PLANNING FOR SAME-SEX SPOUSES

In June, the U.S. Supreme Court ruled that Section 3 of the Defense of Marriage Act (DOMA) — which defines “marriage” as a legal union between a man and a woman for purposes of federal law — is unconstitutional. Virtually overnight, the decision made many legally married same-sex couples eligible for a wide variety of federal tax breaks and other benefits previously available only to heterosexual couples. In August, the IRS clarified that same-sex couples married in jurisdictions that recognize same-sex marriage will be treated as married for federal tax purposes — regardless of where they reside. These rulings have particular significance for estate planning.

EXPANDED ELIGIBILITY

The U.S. Supreme Court ruling extended marriage-related federal tax benefits only to same-sex married couples residing in states that recognized their union. So if a same-sex couple married in a state where same-sex marriage was legal but resided in a state where it wasn’t recognized (or subsequently moved to such a state), the

decision didn’t require the couple’s marriage to be recognized for federal benefits purposes.

Under the IRS ruling, however, only the state of “celebration” — that is, the jurisdiction where the marriage occurred — is relevant. As a result, same-sex married couples in every state generally now will be treated as married for *all* federal tax provisions in which marriage is a factor, such as filing status, tax-advantaged treatment of certain employee benefits, IRA contribution limits, and gift and estate tax breaks.

AVAILABLE BREAKS

Now, like other married couples, same-sex married couples may be able to take advantage of gift and estate tax breaks such as:

The marital deduction. This allows one spouse to transfer an unlimited amount of property to the other, during life or at death, without triggering federal gift or estate taxes (as long as the recipient spouse is a U.S. citizen). Also, certain estate planning vehicles, such as qualified terminable interest property trusts (or qualified domestic trusts for non-U.S. citizens), qualify for the marital deduction.

Exemption portability. This allows a surviving spouse to take advantage of the deceased spouse’s unused gift and estate tax exemption (provided the deceased spouse’s executor makes a portability election on a timely filed estate tax return). For 2013, the exemption is \$5.25 million, so portability can be used to shield as much as \$10.5 million from tax.

Gift splitting. This allows married couples to combine their exemptions to give away up to \$10.5 million (for 2013) tax-free, regardless of



which spouse owns the gifted assets. It also allows couples to combine their annual gift tax exclusions (currently, \$14,000 per recipient), enabling them to give away up to \$28,000 per year to any number of recipients without using up any of their exemption amounts.

These and other gift and estate planning breaks make it much easier for many affluent same-sex couples to reduce or eliminate gift and estate taxes.

REVIEW YOUR SITUATION

If you're part of a same-sex couple — married or not — talk to your advisor about your estate planning options in light of the Supreme Court's DOMA ruling.

Married same-sex couples that already paid federal gift or estate taxes should consider filing an amended return and claiming a refund. ♣

ESTATE PLANNING RED FLAG

You haven't discussed planned gifts with the charities that will receive them

If your estate plan includes charitable donations, it's a good idea to discuss any planned gifts with the intended recipients before you finalize your plans. This is particularly important for donations that

place restrictions on the charity's use of the gift, as well as donations of real estate or other illiquid assets.

Some charities have policies of rejecting gifts that come with strings attached — they accept only unrestricted gifts. And many charities are reluctant to accept gifts of real estate or other noncash assets that may expose them to liability or require an investment in order to convert the assets into operating funds.

If a charity rejects your gift, the property will end up back in your estate and will go to any contingent or residual beneficiaries. If these beneficiaries aren't other charities, rejection of the gift may increase your estate tax liability.

Real estate is particularly risky for nonprofits. The charity may be exposed to liability for environmental issues, zoning and building code violations, and other risks. It may require a cash investment to pay the mortgage or maintain the property. And certain types of property — such as rental properties — generate "debt-financed income," which may cause the nonprofit to be subject to unrelated business income tax.

Even if a charity accepts gifts of real estate, it may place strict conditions on such gifts. For example, to minimize their liability, some charities require donors to place real estate in a limited liability company (LLC) and donate LLC interests. Another option is to donate property to a supporting organization that disposes of real estate on a charity's behalf.



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OHIO'S PROPOSED LEGISLATION PROVIDES PRESUMPTIONS AGAINST INHERITANCE FOR POSTHUMOUSLY-BORN "A.R.T." CHILDREN

BY TERESA G. SANTIN



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A committee within the Ohio State Bar Association has proposed legislation to modernize Ohio's intestacy, will, and trust laws, as well as Ohio's Parentage Act, according to current reproductive science. Conceiving children with Assisted Reproductive Technologies ("ART") is now commonplace. It is thus necessary to ensure that "ART" children are considered in the estate planning process by clients and their attorneys. The following is a synopsis of the proposed legislation regarding inheritance rights of posthumously-born "ART" children.

Intestacy

The proposed legislation is not protective of posthumously-born "ART" children, but only clarifies current law. Namely, only children alive at the death of an intestate (a person who dies without a valid will), or born within a specified period of gestation thereafter, may inherit under Ohio's intestacy statute, O.R.C. 2105.06. The proposed legislation provides that no children may inherit under Ohio's intestacy statute unless alive at, or born within, 300 days of the intestate's death. The gestation period of 300 days is consistent with the period provided for gestation under Ohio's Parentage Act. Thus, posthumously-born "ART" children may only inherit under the intestacy statute *if* "conceived" before, or possibly within a few days of, the intestate's death.

Will

The proposed legislation provides a presumption against inheritance for posthumously-born "ART" children, unless the testator (a person who dies with a valid will) specifically states otherwise. The proposed legislation provides that no children born more than 300 days after the testator's death will inherit, unless the will provides otherwise. Further, *even if* a will provides for posthumously-born "ART" children, such a will may *not* provide for "ART" children born more than one year and 300 days after the testator's death. The time provided—one year and 300 days—is an attempt by the committee to balance a testator's desire to control the distribution of his or her assets at death and the public's interest in efficient estate administration.

Trust

The proposed legislation provides a presumption against inheritance for posthumously-born "ART" children, unless the settlor (a person who creates a trust document during his or her lifetime) specifically states otherwise in the trust document. The proposed legislation provides that no children may be beneficiaries under a trust if born more than 300 days after the settlor's death, or more than 300 days after the event causing a class of beneficiaries in the trust document to close, unless the settlor's trust expressly provides otherwise.

A settlor may provide for a time period after the settlor's death or event causing a class to close, within which "ART" children may be born and inherit, provided the time period does not exceed five years after the date of the settlor's death, or an event causing the class to close. Finally, if a trust document indicates a desire to include posthumously-born "ART" children as beneficiaries, but does not specify a time period within which such "ART" children must be born in order to inherit, the default time period is one year and 300 days after the settlor's death or event causing the class of beneficiaries to close.

Because presumptions are still against inheritance for posthumously-born "ART" children, it is important to contemplate their inheritance rights in the estate planning process. These proposed changes are especially apropos for those who have stored genetic materials, or those who have children or other family members with stored genetic materials.

Should you have any questions about Ohio's current or proposed legislation regarding "ART" children and how it may affect your estate planning, please feel free to contact your Weston Hurd attorney.

Source

Rectenwald, David J. *The Inheritance Rights of "ART" Children*. PROBATE LAW JOURNAL OF OHIO, Volume 23, Issue 5 (2013): 190-199.